UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DMITRI VALLERVEICH TATARINOV, [A72 779 308], Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO; et al., Respondents.	No. 07cv2033 L (NLS) **EXHIBITS**

U.S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: A72 779 308

In the Matter of:

Respondent: TATARINOV DIMITRI, VALEREVEICH

880 FRONT ST. USINS SAN DIEGO, CA 92101 (619) 557-6011
(Number, street, city, state and ZIP code) (Area code and phone number)

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

JUN 24 1998

FILED WITH
IMMIGRATION COURT
SAN DIEGO, CA

☐ 1. You are an arriving alien.
☐ 2. You are an alien present in the United States who has not been admitted or paroled.
☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

4. You are not a citizen or national of the United States.
5. You are a native of Russia and a citizen of Russia.
6. On May 23, 1992, you were admitted to the United States at New York, NY on or about May 23, 1992 as a non-immigrant.
7. On January 6, 1995, you were granted conditional resident status pursuant to the Immigration and Nationality Act, as amended.
8. On August 30, 1995 you were convicted in Municipal Court, County of San Diego of the offense of THEFT OF PERSONAL PROPERTY/PETTY THEFT, in violation of Section 484(a)/488 of the California Penal Code.
9. On August 12, 1996 you were convicted in Superior Court, County of San Diego of the offense of ROBBERY, in violation of Section 211 of the California Penal Code.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(A)(ii) of the of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at: to be calendered and notice provided by the office of the Immigration Judge. Notice will be mailed to the address provided by the respondent
(Complete Address of Immigration Court, Including Room Number, if any)

on _____ at _____ to show why you should not be removed from the United States based on the charge(s) set forth above.
(Date) (Time)

Assistant District Director, Investigations
(Signature and Title of Issuing Officer)

Date: April 13, 1998

San Diego, CA
(City and State)

JUN 03 1999

See reverse for important information

Form I-862 (Rev. 4-1-97)

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See reverse for important informati

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
JUN 24 1998
FILED WITH
IMMIGRATION COURT
SAN DIEGO, CA

[signature] (Signature of Respondent)

Before: [signature] SA (Signature and Title of INS Officer)

Date: 4/13/98

Certificate of Service

This Notice to Appear was served on the respondent by me on April 13, 1998 (Date), in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☒ in person ☐ by certified mail, return receipt requested ☐ by regular mail

☒ Attached is a list of organizations and attorneys which provide free legal services.

☒ The alien was provided oral notice in the ENGLISH language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

[signature] (Signature of Respondent if Personally Served)

[signature] SA (Signature and Title of Officer)

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already in evidence.

JUDGE FOR THE RECORD

The respondent, through counsel, also filed a CBS News, 60 Minutes broadcast and transcript. The Service has objected to it based upon relevancy grounds. I will note the Service's objection, but I will receive the items into evidence as Exhibit 33. They may have little bearing or may not have much weight, but I will wait until I hear all of the evidence and argument regarding the weight to which I should give the evidence, but it will be received as Exhibit 33.

Exhibit 34 is the Court's interim order and the clerk's cover letter, dated January 20, 2000 with the notice of hearing rescheduling the hearing. Exhibit 35 for identification purposes only is the lodged charge with new factual allegation 10, and then lastly, Exhibit 36 is the Service's pre-hearing statement motion to admit documents in objection to the submission. Let me mark it as Exhibit 36 for identification. It was filed on January 25, 2000, and it does include a certificate of service.

JUDGE TO MR. VERHOVSKOY

Q. Did the respondent receive his copy through you, counsel?

A. Yes, we did, Your Honor.

Q. Very good.

JUDGE FOR THE RECORD

Let me receive it as Exhibit 36 in the case.

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JUDGE TO MR. VERHOVSKOY

Q. In terms of the lodged charge and the new factual allegation, does the respondent acknowledge proper service of the new factual allegation 10 and the lodged charge?

A. We will acknowledge service. We do object. We'd lodge an objection to it.

JUDGE FOR THE RECORD

Well, I will receive it into evidence as Exhibit 35 in the case.

JUDGE TO MR. VERHOVSKOY

Q. Have you explained to the respondent this new factual allegation and the lodged charge?

A. Yes.

Q. And would you waive a reading by me to him of the new factual allegation and the lodged charge?

A. We waive the reading, Your Honor.

Q. Very good. So you're confident that he understands the additional factual allegation and the lodged charge?

A. Yes.

Q. In terms of your objection, counsel, it will be noted but overruled. The regulations give the Immigration Service the unfettered right to lodge a new charge at any time.

JUDGE FOR THE RECORD

That brings the record up to date.

U.S. Department of Justice
Immigration and Naturalization Service

Additional Charges of Inadmissibility/Deportability

In: ☒ **Removal proceedings under section 240 of the Immigration and Nationality Act**

☐ **Deportation proceedings commenced prior to April 1, 1997 under former section 242 of the Immigration and Nationality Act**

In the Matter of:

Alien/Respondent: Valereveich Tatarinov-Dimitri

File No: A72 779 308 Address: c/o Vladamir Verhovskoy, Esq.P.O. Box 620129 San Diego, CA. 92162

There is/are hereby lodged against you the additional charge(s) that you are subject to being taken into custody and deported or removed from the United States pursuant to the following provision(s) of law:

Section 237(a)(2)(A)(I)— Within five after your date of admission into the United States, you were convicted of a crime involving moral turpitude for which a sentence of one year or more could have been imposed. (i.e. you were admitted on 5/22/92 as a non-immigrant and were later convicted of ROBBERY, in violation of section 211 of the Cal. Penal Code, on 8/12/96).

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

JAN 25 2000

IMMIGRATION COURT
SAN DIEGO, CA

In support of the additional charge(s) there is submitted the following factual allegation(s) ☒ in addition to ☐ in lieu of those set forth in the original charging document:

10. The above offenses did not arise out of a single scheme of criminal misconduct.

Dated: 1/25/00

(Signature of Service Counsel)

Additional allegations (continued):

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the charging document and that you are inadmissible or deportable on the charges contained in the charging document. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Certificate of Service

This charging document was served on the respondent by me on 1/25/06 (Date), in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☐ in person ☐ by certified mail, return receipt requested ☑ by regular mail

to: Vladimir Vetshtein, Esq P.O. Box 620129, San Diego, CA 92162
(Alien's address)

☐ The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

_____ _____
(Signature of respondent if personally served) (Signature and title of officer)

Form I-261(Rev. 4/1/97)N

U.S. Department of Justice
Immigration and Naturalization Service

Additional Charges of Inadmissibility/Deportability

In: ☒ **Removal proceedings under section 240 of the Immigration and Nationality Act**

☐ **Deportation proceedings commenced prior to April 1, 1997 under former section 242 of the Immigration and Nationality Act**

In the Matter of:

Alien/Respondent: Dmitri V. Tatarinov

File No: A72 779 308 Address: c/o Vladimir Verhovsdoy, P.O. Box 620129, San Diego, CA 92162-0129

There is/are hereby lodged against you the additional charge(s) that you are subject to being taken into custody and deported or removed from the United States pursuant to the following provision(s) of law:

DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

JUL 27 2000

FILED WITH
IMMIGRATION COURT
SAN DIEGO, CA

In support of the additional charge(s) there is submitted the following factual allegation(s) ☒ in addition to ☐ in lieu of those set forth in the original charging document:

~~10~~ 11) On or about ~~June 9, 2000~~ January 6, 1995, your status was adjusted to that of a Lawful Permanent Resident.

43 Od
JUL 27 2000

Dated: 7/27/00

(Signature of Service Counsel)

Form I-261(Rev. 4/1/97)N

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Additional allegations (continued):

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the charging document and that you are inadmissible or deportable on the charges contained in the charging document. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Certificate of Service

This charging document was served on the respondent by me on 7/27/00, in the following manner and in
(Date)

compliance with section 239(a)(1)(F) of the Act:

☒ in person ☐ by certified mail, return receipt requested ☐ by regular mail

to: Dmitri V. Tatarinov, C/O Vladimir Verhovsdoy, P.O. Box 620129, San Diego, Ca 92162-0129
(Alien's address)

☐ The alien was provided oral notice in the NA language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of respondent if personally served)

Jesse Tuttle - Trial Attorney
(Signature and title of officer)

Form I-261(Rev. 4/1/97)N

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IMMIGRATION COURT
401 WEST A STREET, SUITE #800
SAN DIEGO, CA 92101-7904

In the Matter of

Case No.: A72-779-308

TATARINOV-DIMITRI, VALEREVEICH
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Dec 13, 2001. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[*] The respondent was ordered removed from the United States to Russia. ~~or in the alternative to~~

[*] Respondent's application for voluntary departure was denied and respondent was ordered removed to Russia. ~~alternative to~~

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to

[*] Respondent's application for asylum was ( )granted (*)denied ( )withdrawn.

[*] Respondent's application for withholding of removal was ( )granted (*)denied ( )withdrawn, including benefits under the Convention Against Torture.

[*] Respondent's application for cancellation of removal under section 240A(a) was ( )granted (*)denied ( )withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[*] Respondent's application for a waiver under section 212(h), and 212(c) of the INA was ( )granted (*)denied ( )withdrawn or ( )other.

[*] Respondent's application for adjustment of status under section 245 & 212(h) of the INA was ( )granted (*)denied ( )withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[*] Other: R has reserved appeal which must be properly filed w/ the BIA on or before JAN 14, 2002

Date: Dec 13, 2001

Appeal: Waived Reserved Appeal Due By: 1/14/02

INS only — By Rondy

RICO A. BARTOLOMEI
Immigration Judge

GSD

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
SAN DIEGO, CALIFORNIA

File No.: A 72 779 308 December 13, 2001

In the Matter of

DIMITRI VALEREVEICH TATARINOV,) IN REMOVAL PROCEEDINGS
)
Respondent)

CHARGE: Section 237(a)(2)(A)(ii) of the I&N Act (any time after admission, convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct). *

LODGED CHARGE: Section 237(a)(2)(A)(i) of the I&N Act (convicted of a crime involving moral turpitude for which a sentence of one year or more could have been imposed). *

APPLICATIONS: Termination; asylum; withholding of removal; benefits under the United Nations Torture Convention; former waiver of inadmissability under Section 212(c) of the Act; adjustment of status under Section 245(a) in conjunction with a waiver under Section 212(h) of the Act; voluntary departure at the conclusion of the removal proceedings under Section 240(B)(b) of the Act.

ON BEHALF OF RESPONDENT:

James R. Patterson, Esquire
110 W. C St., Suite 905
San Diego, California 92101

ON BEHALF OF SERVICE:

Janet Muller, Esquire
880 Front St., Suite 1234
San Diego, California 92101

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent, a 35-year-old native and citizen of the former Soviet Union now Russia, first came to the United States

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as a non-immigrant on or about May 23, 1992. Subsequently to his admission he married a United States citizen who filed a visa petition on his behalf. The visa petition was ultimately approved conferring upon the respondent lawful permanent resident status as of January 6, 1995.

The respondent suffered three criminal convictions in the United States subsequent to his admission. As a consequence, on April 13, 1998, the Immigration and Naturalization Service issued to him a Notice to Appear (Form I-862) (Exhibit 1). The charging document was filed with the Court in San Diego, California on June 24, 1998, vesting this Court with jurisdiction over the respondent's case.

The procedural history of the case is familiar to both parties. Therefore, the Court will not repeat it in detail in this oral decision. The respondent, through his first attorney, admitted to the truth of factual allegations that he is not a citizen or national of the United States, but a native and citizen of the country of Russia, who was admitted to this country as a visitor on or about May 23, 1992.

The respondent ultimately admitted that he is a lawful permanent resident of the United States. Part of the reason why the case proceeded at a patient pace was because it was not clear whether the respondent was a conditional resident or a lawful permanent resident until well after the initiation of the proceedings. It is established and was established that the

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respondent is a lawful permanent resident of the United States.

The respondent denied that he was deportable from the United States. He specifically contested the existence of the convictions that were alleged against him. He contested removability not only under the original charge, but also under the lodged charge.

In terms of a designation of a country for removal purposes, initially the respondent attempted to name Canada as a country for removal purposes. Ultimately though he did not press that issue and withdrew an effort to designate a contiguous country to which he was not a resident and had absolutely no ties. Instead, the respondent declined to name a country. He informed the Court that he would be seeking relief in the form of asylum, withholding of removal, benefits under the United Nations Torture Convention, a waiver of inadmissability under former Section 212(c) of the Act, adjustment of status under Section 245(a), and a waiver of inadmissability under Section 212(h), and post-conclusion voluntary departure under Section 240(B)(b) of the Act.

Given the complexity of the issues, the Court will address them one at a time beginning first with the issue of removability.

I. Removability

Ultimately there is no dispute that the respondent suffered a conviction in municipal court for theft of personal

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property/petty theft in violation of Section 484(a)/488 of the California Penal Code on August 30, 1995. The Immigration and Naturalization Service has filed with the Court the conviction documents which support this conviction (Exhibit 16). The conviction document itself is a certified copy, and it does comport with the requirements of the Act. In addition, the Service has filed with the Court evidence demonstrating that the respondent suffered a conviction for robbery in violation of Section 211 of the California Penal Code on August 12, 1996 (Exhibit 12). In addition, the Service has given to the Court a certified copy showing that the respondent plead guilty to violation of California Penal Code Section 484 on September 8, 1996 (Exhibit 17).

The respondent's three convictions are ones which involve moral turpitude. The conviction that he suffered for robbery under Section 211 is one for which a sentence of more than one year could have been imposed. The Immigration and Naturalization Service has established by clear and convincing evidence as required that the charge under Section 237(a)(2)(A)(i) of the Act is sustained as it was a conviction suffered within five years of the respondent's admission as a non-immigrant. The Court finds that the Service has carried its burden of proof to establish that charge.

The respondent's main challenge to that charge was the fact that he is seeking several pardons of his convictions with

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the governor of the State of California and the former President of the United States. Without citing the statute, it is clear that if the respondent had received a pardon from either the governor of the State of California or the President of the United States, he would not be removable for the pardoned offense. While the former President of the United States did grant many pardons before he left office, he did not see it fit to apparently grant the respondent's plea for such a remedy. As such, the respondent is removable under the lodged charge as no evidence has been presented to show that he has been pardoned for the offense.

In addition, the Service has established evidence showing that the respondent suffered all three convictions. These convictions arose not out of a single scheme of criminal misconduct, but on different days and different times and different places. The respondent did admit to factual allegation 10. He did not receive a pardon for any of these offenses. The Court concludes that the Service has established by clear and convincing evidence that the respondent is removable under the original charge as well.

The other contest that the respondent brings to the charges of removability invite this Court to go behind the records of conviction to reassess his guilt or innocence or to find some defenses which, if they existed, would have been within the sole purview of the criminal court. It is well-settled that

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an immigration judge cannot go behind the records of conviction to assess or reassess guilt or innocence or address any other defenses that would have existed or could have existed under State law. The Court finds that the respondent is removable as charged and will focus its attention on relief.

II. Asylum, withholding of removal, benefits under the United Nations Torture Convention.

To be eligible for withholding of removal under Section 241(b)(3)(A) of the Act, a respondent's facts must show a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 467 U.S. 407 (1984). This means that the respondent's facts must establish that it is more likely than not that he would be subject to persecution for one of the grounds specified.

To establish eligibility for asylum under Section 208(a) of the Act, the respondent must meet the definition of a "refugee" which requires him to show persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The burden of proof required to establish withholding of removal is greater than that required for asylum with noted exceptions that have resulted from Congress' amendments to the Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) which need not be

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mentioned further in this decision.

An asylum applicant can establish that his fear is "well-founded" if he shows that a reasonable person in his circumstances would fear persecution. Further, asylum, unlike withholding of removal, may be denied in the exercise of discretion to a respondent who establishes his statutory eligibility for the relief.

An asylum applicant under Section 208(a) of the Act may establish his claim by presenting evidence of past persecution in lieu of evidence of a well-founded fear of persecution. See Matter of H-, 21 I&N Dec. 337 (BIA 1996); Matter of B-, 21 I&N Dec. 66 (BIA 1995); Matter of D-V-, 21 I&N Dec. 77 (BIA 1993); Matter of Chen, 20 I&N Dec. 16 (BIA 1989). If the respondent does not show past persecution, he can present evidence of a well-founded fear of persecution in attempting to establish that a reasonable person in his circumstances would fear harm if returned to the country from which he faces return. There must be a reasonable possibility of actually suffering such persecution.

The asylum applicant must show that his fear of returning is both subjectively genuine and objectively reasonable. The objective component requires a showing by credible, direct, and specific evidence in the record of facts that support a reasonable fear that the asylum applicant faces persecution. See Diaz-Escobar v. INS, 782 F.2nd 1488 (9th Cir.

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1986).

As instructed by the Supreme Court and as further expanded upon by the Board of Immigration Appeals, it is incumbent upon an asylum applicant to show that the "fear" of harm is "on account" one of the five statutorily enumerated grounds. See INS v. Elias-Zacarias, 504 U.S. 478 (1992); Matter of H-, supra. The burden of proof to establish eligibility rests squarely with the respondent. He can meet his burden of proof through his own testimony if he provides a plausible, credible, and detailed account for the basis of his fear of returning in light of evidence of country conditions. See Lopez-Reyes v. INS, 79 F.3d 908 (9th Cir. 1996); Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998); Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998).

The initial question for purposes of asylum and all forms of relief is the respondent's credibility. Without going into detail regarding the various precedent decisions within the United States Court of Appeals or the Ninth Circuit, the jurisdiction in which this cases arises, the import of the case suggests that if the Court does not make an adverse credibility finding, then the respondent's evidence is deemed to be credible, that is the events occurred as the respondent said that they had occurred.

There certainly is a basis for questioning the respondent's credibility in this case. The respondent relatively close in time to his arrival here in the United States filed an

application for asylum with the Immigration and Naturalization Service (Exhibit 36, at Tab A). The application indicates that the respondent signed it under the penalties of perjury on November 17, 1992. The respondent explains that this application was prepared by friends who asked him questions, completed the application, and asked him to sign where they directed him to sign. The respondent told this Court that he did not understand what was written in the application. He was never called to explain the contents of his application. The application suggests that the basis for the respondent's fear of returning to Russia was on account of his religion.

It would seem that the Court should be able to give weight to portions of the respondent's testimony, give less weight to others, and give weight to other portions as a typical trier of fact might do in a proceeding in which the burden of proof is higher than it would seem to be in removal proceedings. Nevertheless, the Court cannot do so under the prevailing law. It must either accept the respondent's testimony as stated or conclude that none of the testimony should be believed except for perhaps the purposes of benefits under the United Nations Torture Convention.

Following that precedent, the Court concludes that while there are concerns with the respondent's credibility and less weight should be given to certain evidence than other evidence, overall the respondent's account given here in court

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has been generally credible.

The respondent testified that he left Russia in part because of a threat that occurred to the company at which he was working. He explained that he was considered a highly educated person who had significant a modicum of wealth for his age in Russia. He was considered a middle to high-level manager of a factory involved with automobiles. He explained that one day when he went to work, he was visited by four people. He believed that these four people wanted to extort money from him in the factory. These individuals demanded the respondent pay them 40,000 rubles. He had been working at the factory for five years. This was apparently the first time that this had occurred. He told them that he did not have that kind of money with him, and he would not be able to pay the money. They told him that he did need to have a package with the money for them. If he did not, he would be "playing with fire."

The respondent perceived that statement to be a serious threat. He feared that these four individuals belonged to an organized criminal element. He believes that these individuals were the same individuals who appeared later to torch his supervisor's automobile. His supervisor's automobile was burned. The respondent believes that the automobile was fire-bombed at the facility by the elements of organized crime because of the refusal to pay the 40,000 rubles.

At least four individuals appeared to the respondent's

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home. Two individuals knocked on the front door, and his younger brother answered the door. These individuals were asking for the respondent. They asked his brother where the respondent and when he would be coming home. The brother apparently replied that he didn't know where the respondent. He believed him to be at work, and he did not know when the respondent would return. He spoke to these two individuals through a window while apparently two other individuals remained at the door. These individuals remained outside because his mother saw them parked out front when she returned from work. The respondent learned of this when he himself returned home. His mother told him of the events and told him that his brother Sergei was scared.

The respondent seemed inconsistent regarding his explanation as to why he did not go to the police. When asked, he stated that it never crossed him mind to go to the police. Then later the respondent explained that he could not go to the police unless a crime had been committed. His attorney clarified and the respondent did understand that it was a serious threat, but he could not take such a threat to the police.

It was these events and the respondent's desire to come to the United States which motivated him to leave. It was not clear whether he intended to remain in this country. Once he did arrive here, he sought asylum, but that asylum application according to the respondent today does not contain correct information. The respondent did make plans to return to Russia

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to visit his mother, but did not follow through with those plans because of the problems that arose after his arrival.

He is afraid to go back to Russia today because he believes that he will be viewed as a common criminal and would be punished because of that. He also does not want to become involved in a society in which extortion is a part of life. He considers himself to be an individual with above average income and in some type of middle lever supervisory capacity in a successful business. He contends that he is a social group, that he would be targeted because he would be considered a member of that social group.

The Court concludes that the respondent has not established that he has suffered past persecution or that he has a well-founded fear of persecution on account of any of the enumerated grounds. Because the Court makes that specific conclusion, it does not reach the question of whether the respondent's convictions are particularly serious crimes that would disqualify him from receiving asylum. The Court would simply note that the respondent's pre-hearing statement (Exhibit 69) is a correct statement of the law the Court would have to follow, and according to Matter of Juarez, 19 I&N Dec. 664 (BIA 1982), these convictions would not likely to be considered as particularly serious crimes. Although, as the Court will highlight for discretion, they are considered very serious by this Court in terms of any discretionary analysis.

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The respondent has not established that he has suffered past persecution. During all of his time in Russia, he received one threat. The threat itself was not directed specifically towards the respondent. The threat was a veiled threat and seemed to be made to the company itself and not personally to the respondent. The burning of the car is not an event that took place directly to the respondent, but instead was directed towards Uri who remains in Russia in the same capacity. In addition, the respondent testified that some meeting took place in which the respondent was present for the first 30 minutes but left, and the meeting resulted in the elimination of any future threats. This event as described then by the respondent would not constitute "past persecution" as that term is understood within this circuit. While it is something that is a criminal incident, it is not one which would rise to the level of past persecution.

In addition, the respondent has not established his membership in a particular social group. He contends to the Court that the social group should be defined as "an individual with above average income in a supervisory capacity in a successful business." The Board of Immigration Appeals in Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) revisited the question of a "particular social group" in trying to determine whether young women of the Chamba-Kunsunta tribe who have not had female genital mutilation practiced upon them by that tribe and who

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opposed that practice was a particular social group. Here the respondent's definition of a social group is not defined by a common characteristic that members of the group either cannot change or should not be required to change because such characteristics are fundamental to their individual identities.

The possible social group of individuals with above average income and supervisory capacities in successful businesses could actually be anyone who considers themselves from a middle economic class. It does not fall within the parameters of a characteristic that members of the group cannot change. An individual can change his business. He can change his socio-economic stature. The respondent simply has not shown it is a particular social group.

There's also a sense in which the respondent offers a second social group which is seemingly incongruous to the group defined above. He defines a second social group as a "common criminal who would be deported from the United States to Russia." He believes that he would face harm from the Russian government if he were sent from the United States to Russia because he believes the Russian authorities would find out of his criminal record. It would seem that if they would find out about his criminal record in the United States, then he would not be considered an individual with above average income in a supervisory capacity in a successful business.

Nevertheless, the respondent has stated without any

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support that he believes he lost his Russian citizenship. The documents offered suggest otherwise. Indeed, during argument the Court agree with his argument that he would still likely be considered a Russian citizen in the end, but there is no evidence which would show that the Russian government would learn of his record here in the United States particularly since he has sought asylum in this country and that is something which by law cannot be revealed to the foreign government. In addition, no evidence offered shows that he would be punished because of that by the Russian government.

To the extent that the respondent contends that he would suffer future persecution in Russia on account of a political opinion, and the respondent would compare his situation to the respondent's situation in Desir v. Ilchert, 840 F.2nd 723 (9th Cir. 1988). He has not carried his burden of proof to show that the "cleptocracy" that existed in Haiti is the same that the respondent faced in Russia or would face if he to go to that country. The respondent also has not established that the Russian government would be unable or unwilling to try to control the extortion that exists in the country.

The respondent has provided evidence showing that extortion does exist in Russia. However, the United States Department of State Country Report for the practices for 1998 describes that in 1997, for example, the equivalent of the Attorney General's office received 27,155 complaints about police

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actions and in 17,850 of the cases, the accusations against the officers led to convictions or official reprimands. (Exhibit 32, at B.6). The respondent has not shown a fear of harm from a group that the government of Russia would be unwilling or unable to control.

The respondent has not carried his burden of proof to show his eligibility for asylum because he has not established he suffered past persecution or that he has a well-founded fear of persecution on any of the five enumerated grounds from a group that the government would be unwilling or unable to control. Accordingly, his application for asylum is denied as a matter of law.

In terms of discretion, the Court does not resolve that issue today except to highlight that there are serious discretionary concerns. The respondent filed an application for asylum which he admits today does not contain truthful information. It is a serious incident. It is the type of act which clogs the Immigration Service from prompt adjudications since so many people file asylum applications. In addition, the respondent has suffered three convictions. The 1996 conviction involves an altercation. These are serious concerns.

The respondent does though have a tremendous favorable factor to consider on his behalf, and that is the loyalty of his United States citizen spouse who has stood behind the respondent throughout all of these problems which occurred after their

marriage. The Court has read carefully the respondent's spouse's letter (Exhibit 27), in which on August 19, 1996 she wrote to J.C. Penney explaining the impact that the respondent's actions have had on her, their marriage, and the respondent's future in this country. It is a moving letter describing her state of mind in 1996 and appears to carry forward to the present as the impact that this is having upon her. The Court needed resolve the question of discretion since it is clear, as stated above, that the respondent has not carried his statutory burden of proof for asylum.

Inasmuch as the respondent has failed to meet the lesser burden of proof required for asylum, it follows that he has not carried the stricter burden of proof for withholding of removal to Russia. His application for withholding of removal to Russia is denied.

Likewise, the respondent has not carried his burden of proof to show that it is more likely than not that he would suffer torture if he has to be removed from the United States to Russia. See Matter of S-V-, Int. Dec. 3430 (BIA 2000). Indeed, the respondent's mother, brother, and former bosses all have remained in Russia without any type of apparent harm that would be considered either persecution or torture. His application for benefits under the United Nations Torture Convention is denied for his failure to carry his burden of proof.

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III. Cancellation of removal for certain permanent residents under Section 240(A)(a) and the waiver of inadmissability under former Section 212(c) of the Act.

The respondent seeks cancellation of removal for certain permanent residents under Section 240(A)(a) of the Act. The respondent, however, cannot establish that he has lawfully resided continuously in the United States for seven years immediately preceding the date of the initiation of proceedings to remove him from the United States. The Notice to Appear was served on the respondent on April 13, 1998. It initiated the proceedings against the respondent. While the respondent continues to accrue five years as a permanent resident and will likely meet that requirement early next year. If a timely appeal is taken by either party to the Court's decision, he still would not have the seven years after having been admitted in any status.

Under Section 240(A)(d)(1), certain events terminate the continuity of presence in the United States, including service of the Notice to Appear. In this case, the service of the Notice to Appear at least would be a stop-time event as of April 13, 1992. As the respondent entered on May 23, 1992, he cannot prove that he had lawfully resided continuously for seven years after having been admitted in any status. He cannot show continuous residence from or before April 13, 1991. His application for cancellation of removal for certain permanent

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residents must be denied as a matter of law. See Section 240(A)(a)(2) of the Act.

The respondent also seeks the former waiver of inadmissability under Section 212(c) either separate from cancellation of removal for certain permanent residents and/or in conjunction with cancellation of removal under Section 240(A)(a) of the Act. The respondent pointed to specific cases within the United States Court of Appeals for the Ninth Circuit, the jurisdiction in which this case arises.

He also points to the Supreme Court's decision in St. Cyr v. INS, 121 S.CT 2271 (2001). There are many reasons why St. Cyr does not apply in this case, and the Court implores the Board of Immigration Appeals to examine the record carefully before considering any type of remand solely for the applicability of that specific issue.

First, all of the cases that have addressed the impact of convictions preceding either AEDPA or IIRIRA have been convictions which the respondent has plead guilty. In this case, the respondent's 1996 conviction under penal code Section 211 was after a trial by jury. None of the cases cited by the respondent in the arguments that he has made do not address the situation where a person is found guilty of an offense which predates IIRIRA and has said that that should apply. In fact, all of the cases seems to stand for a contrary proposition, and that is where the respondent has plead guilty in part relying on the fact

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that 212(c) would be an available remedy.

Also, it is clear that the respondent has a post-IIRIRA conviction, the conviction in 1998. That alone would again take the case from any St. Cyr type of analysis. In addition, in the respondent's plea of guilty for the first offense and the last offense, he was not and would not be eligible for the waiver of inadmissability under Section 212(c) of the Act even if the law had never changed. As the Court sits here today and if I were to close my eyes and not see any type of IIRIRA, the respondent would not be eligible even for the waiver of inadmissability under Section 212(c) of the Act had there not been any amendments.

In this Court's humble opinion, it would take a very contorted application of the Supreme Court's decision or applications of different provisions of law to construe them in such a way that the respondent could be eligible for the waiver under Section 212(c) of the Act, but then again, certain unpublished decisions have been returned which might perhaps suggest such a reading. On this record though it is clear that the respondent does not qualify for the former waiver of inadmissability under Section 212(c) of the Act as that is construed by the Supreme Court's decision in St. Cyr. Accordingly, his application for this form of relief are denied.

IV. Section 245(a) in conjunction with Section 212(h) of the Act.

The respondent also seeks adjustment of status in

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conjunction with a 212(h) waiver. The respondent would seemingly be eligible but for the waiver under Section 212(h) of the Act, but he is ineligible for this waiver because he has not lawfully resided continuously in the United States for seven years immediately preceding the date of the initiation of the proceedings to remove him from the United States. He acknowledges that provision of law, but argues that it violates notions of equal protection, and he should be afforded the opportunity to pursue the waiver.

This Court is without any jurisdiction whatsoever to pass on the constitutionality of the Act and law that it is required to administer. It must follow the statute as the statute is written. As the statute is written, the respondent simply would not qualify. The Court also points out that the United States Court of Appeals recently had addressed the equal protection arguments which are raised here and decided against the respondent. See Finau v. INS, 270 F.3d 859 (9th Cir. 2001); see also Moore v. INS, 251 F.3d 919 (11th Cir. 2001). The respondent's applications for adjustment of status in conjunction with the 212(h) waiver are denied.

V. Voluntary departure at the conclusion of proceedings under Section 240(B)(b) of the Act.

The respondent seeks at the conclusion of the proceedings voluntary departure under Section 240(B)(b)(1) of the Act. The respondent can meet three components of post-conclusion

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voluntary departure. He can established that he is not disqualified outright under one of the grounds which are enumerated under subsection (C) of Section 240(B)(b)(1). Also he can establish his physical presence and that he would depart the United States.

The respondent as of today's date cannot establish that he has been a person of good moral character for the five years immediately preceding his application for voluntary departure. His 1998 conviction coupled with the prior convictions demonstrate that the respondent falls within the individuals listed under Section 101(f)(3) and therefore cannot establish the requisite good moral character. The Court is aware with the passage of time that the respondent could at some future point show the requisite moral character.

If that should become the case and if it were to come down to a question of discretion for voluntary departure, the Court would be inclined to grant him the minimal form of relief of voluntary departure with a significant bond greater than the minimum $500 amount with the maximum period as a matter of discretion. While the respondent's convictions are serious and are not to be diminished, the respondent's spouse who has stood by him throughout these travails would merit that the respondent be given this minimal form of relief to preserve any future opportunities that her spouse, the respondent, might have to be reunited with her without having to face the stigma of the formal

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order of removal. This Court is very mindful that the Board of Immigration Appeals has de novo review, and if the Board of Immigration Appeals is faced with the situation where the respondent can show good moral character given the passage of time that might occur through any type of appellate review, it certainly can exercise such power in making its independent determination regarding the question of post-conclusion voluntary departure.

At this juncture though the respondent simply cannot show his statutory eligibility for the minimal relief, and therefore, this Court must deny it.

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ORDERS

IT IS HEREBY ORDERED that the respondent's applications for asylum, withholding of removal, benefits under the United Nations Torture Convention, cancellation of removal for certain permanent residents, waiver of inadmissability under former Section 212(c) of the Act, adjustment of status in conjunction with the waiver under Section 212(h) of the Act, and voluntary departure at the conclusion of the removal proceeding be in and are hereby denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Russia based upon the original and the lodged charge brought against him.

RICO J. BARTOLOMEI
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before RICO J. BARTOLOMEI, in the matter of:

DIMITRI VALEREVEICH TATARINOV

A 72 779 308

San Diego, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Amanda M. Malek

Amanda M. Malek, Transcriber

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

May 5, 2002
(Completion Date)

U.S. Department of Ju[illegible]
Executive Office for In[illegible]ration Review
Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Patterson, James R., Esq.
110 West C Street
Suite 905
San Diego, CA 92101

Office of the District Counsel/SN
880 Front St., Room 1234
San Diego, CA 92101-8834

Name: TATARINOV-DIMITRI, VALEREVEICH **A72-779-308**

Date of this notice: 01/14/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Jeffrey Fratter
Chief Clerk

Enclosure

Panel Members:
VILLAGELIU, GUS

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U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A72-779-308 - San Diego

Date: JAN 14 2003

In re: TATARINOV-DIMITRI, VALEREVEICH

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Patterson, James R., Esq.

ON BEHALF OF SERVICE: Janet Muller, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FOR THE BOARD

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DIMITRI V. TATARINOV,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN DIEGO,

Respondent.

Civil No. 02cv2029-W (BEN)

REPORT AND RECOMMENDATION RE: GRANTING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Petitioner, Dimitri V. Tatarinov, was tried by a jury in August, 1996 and convicted of second degree robbery. He was sentenced to probation which terminated on October 18, 2002, after the filing of his habeas petition.

Although never incarcerated for the crime, Tatarinov now seeks federal habeas corpus relief from the lingering effects of his conviction pursuant to 28 U.S.C. § 2254. He alleges a single ground for relief. Specifically, he alleges the trial court committed reversible error in giving a jury instruction on self-defense which could have been remedied on appeal. However, he received ineffective assistance of appellate counsel when his retained counsel failed to file an opening brief and his direct appeal was dismissed.

The trial finished on August 12, 1996 and the appeal was dismissed on April 28, 1997 (with the Remittitur issued on July 1, 1997). The instant Petition was filed on October 11, 2002. The Respondent now moves to dismiss arguing that the Petition is barred by the one-year statute of limitations set forth in 28 U.S.C. § 2244(d).

After considering all of the pleadings and relevant lodgements, and for the reasons set forth below, it is recommended that the Motion to Dismiss the Petition for Writ of Habeas Corpus be GRANTED.

II. THE STATUTE OF LIMITATIONS

A. THE AEDPA ONE-YEAR STATUTE OF LIMITATIONS

Respondent contends that the Petition is time barred by the Antiterrorism and Effective Death Penalty Act ("AEDPA").[1] AEDPA amended 28 U.S.C. § 2244 by adding subdivision (d), which provides for the one-year limitation period for state prisoners to file habeas corpus petitions in federal court. Section 2244(d) states, in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of :
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this

[1] AEDPA applies to Petitioner's case as he filed his Petition in 2002. *Lindh v. Murphy*, 521 U.S. 320 (1997) (AEDPA applies to petitions for writs of habeas corpus filed in federal court after its effective date of April 24, 1996). Prior to AEDPA, there was no statute of limitations for federal habeas relief.

subsection.

28 U.S.C.A. § 2244(d) (West Supp. 2002).

Petitioner does not fall within the statutory tolling provisions of § 2244(d)(1)(B) or (C) as he does not: (a) show any impediment to filing an application by State action in violation of the United States Constitution; or (b) rely on a constitutional right newly recognized by the United States Supreme Court. Instead, this Court must determine whether §2244(d)(1)(A) or (D) applies and the date from which (under either section) the one-year period began to run. To complicate the matter, Petitioner's counsel deceived him by telling him an appeal was being pursued when in reality, it had been abandoned and eventually dismissed.

1. Applying §2244(d)(1)(A)

Under § 2244(d)(1)(A) the one-year limitation period begins to run on the date the judgment becomes final either by the conclusion of direct review or the expiration of the time for seeking such review.[2] Petitioner was sentenced on September 10, 1996. He timely filed a notice of appeal on October 25, 1996. Then his attorney failed to file an appeal brief. Because no brief was filed, the appeal was dismissed on April 28, 1997. Thus, thirty days later (*i.e.*, May 28, 1997) becomes the first critical date for purposes of identifying the start of the one-year time clock. This is because under California law, a judgment becomes "final" 30 days after the Court of Appeal orders an appeal dismissed. Rule 24 of the California Rules of Court states, "A decision of a Court of Appeal becomes final as to that court 30 days after filing....An order dismissing an appeal involuntarily is a decision for purposes of the preceding sentence." Consequently, under 2244(d)(1)(A), the decision became final on May 28, 1997 and the one-year limitation period expired on May 28, 1998. Under this scenario, there would be no statutory tolling under 2244(d)(2) because there was no pursuit of state collateral review during this period, and his federal petition would be four years too late.

[2] A time line of significant events is attached for the reader's convenience. See Appendix.

2. Applying § 2244(d)(1)(D)

There is, however, a second scenario which points to a later starting date. Under § 2244(d)(1)(D), the clock begins ticking on the day "the factual predicate of the claim...could have been discovered through the exercise of due diligence." Here, the claim centers on the loss of Petitioner's appeal rights by the failure of his counsel to do anything beyond filing a notice of appeal. The question thus becomes, "when could petitioner have discovered his appeal had been dismissed had he exercised due diligence?"

In this case, his retained counsel, Mr. Vladimir Verhovsky, Esq., was less than candid and misrepresented the status of the appeal on several occasions. For example, Petitioner's wife declared, "[f]rom late fall of 1996 through the summer of 1998, I continually asked Mr. Verhovsky how the robbery appeal was going." Declaration of Patricia Lynn Jacks-Tatarinov, Petition for Writ of Habeas Corpus, Exhibit "A," at 2. She continues, Verhovsky "gave responses such as, 'appeals take several months,' 'appeals can take years,' 'the appeals court must believe we have some merit to the case as they have not responded'...and 'the court is still looking into the matter.'" *Id.* Petitioner in his own declaration explains that after he was aware the appeal had been dismissed, "I asked [Verhovsky] several times to do something about it. Each time he said he would. Finally in September 1999 Mr. Verhovsky filed a motion to reinstate the appeal." Petition, Exhibit "B," at 1.

a. Petitioner's Contention: January 2, 2001

Petitioner argues that the statute should run (under 2244(d)(1)(D)) from January 2, 2001. Petition, at 17-18. He argues that date because Verhovsky continued to represent him on various matters through December 24, 2000. On December 24th, he received a letter from Verhovsky ending, without explanation, his representation in all matters. *See* Petition, Exhibit "G." Approximately three weeks later, Petitioner received notice from the State Bar that Verhovsky had been suspended from the practice of law. Petitioner defends himself saying, "[p]rior to that time, petitioner was unduly influenced by Verhovsky's legal advice, which made it a practical impossibility for petitioner to discern Verhovsky's

incompetent representation." Petition, at 18. He explains further that, the "attorney-client relationship was particularly strong because Verhovsky could communicate with petitioner in Russian, petitioner's first language." *Id.*

b. Respondent's Contention: Fall 1998

Not surprisingly, Respondent argues that under this second scenario the statute should run from an earlier date: the fall of 1998. Memorandum in Support of Motion to Dismiss, at 7-8. Respondent argues that "the factual predicate for Petitioner's claim was *discoverable* with the exercise of due diligence well before either December 24, 2000 or January 2, 2001....Petitioner had *actual knowledge* that Verhovskoy failed to file the opening brief and the appeal had been dismissed, no later than Fall 1998." *Id.* (emphasis in original). In support of this position, Respondent points to the declarations of Petitioner and his wife. Specifically, Respondent notes that Petitioner's wife, on her own, called the court during the summer of 1998 and found out "the appeal was not active." *Id.* at 8 (quoting Declaration of Patricia Jacks-Tatarinov, Petition, Exhibit "A"). Petitioner's wife then called Verhovsky and Verhovsky "admitted he had not filed the appeal." Respondent continues this line of argument by pointing to Petitioner's own declaration wherein he relates, "[i]n 1998, Mr. Verhovskoy admitted that he had not filed the appeal." *Id.* at 8 (quoting Declaration of Dimitri Tatarinov, Petition, Exhibit "B"). Thus, building the argument from Petitioner's own evidence, Respondent argues that Tatarinov was actually aware that the appeal had been dismissed by the fall of 1998. Respondent contends that it is the date of Petitioner's actual knowledge of the dismissed appeal that starts the clock running (as opposed to Petitioner's knowledge of the legal significance of the dismissed appeal.) *Id.* at 9. Respondent concludes that with the clock beginning to tick in the fall of 1998, the statute of limitations had certainly run by 2002, the year the federal Petition was filed.

c. The Due Diligence Date: The Summer of 1998

In sum, under 2244(d)(1)(D), Petitioner identifies January 2001 as the critical date, while Respondent picks the fall of 1998 as the date the clock began ticking. Respondent's

argument is generous. It is based upon Petitioner's *actual* knowledge. Section 2244(d)(1)(D), however, starts the clock running on the day "the factual predicate of the claim...*could have been discovered* through the exercise of due diligence." (Emphasis added.) In other words, the day Petitioner could have discovered that the appeal had been lost, had he exercised appropriate diligence.

If one in Petitioner's place was extremely diligent, one could call the court of appeals every week checking on the status of the appeal. Such a person would have discovered the truth in early May 1997. If one checked every quarter, one would have discovered the dismissal no later than the fall of 1997. If one checked only once a year, a more reasonable approach, the dismissal would still have been discovered in the fall of 1997. It took almost two years before Petitioner's wife inquired of the court. Even if that were deemed to be within the outer boundaries of "due diligence," the statute of limitations would have begun to run in the summer of 1998. Certainly, the fact that Petitioner's wife actually called the court, strongly suggests Petitioner could have exercised the same diligence.

This Court finds that had Petitioner exercised due diligence, notwithstanding his attorney's misrepresentations, Petitioner could have discovered the fate of his appeal in the summer of 1998. As a result, the statute of limitations expired one year later in the summer of 1999 – approximately three years prior to the filing of the instant Petition. Finally, there would be no entitlement to a statutory tolling of the clock because nothing was done to reinstate the appeal or collaterally attack the conviction between the summer of 1998 and the summer of 1999 when Petitioner's time ran out.

d. An Aside: "Retriggering" the Statute

As an aside, though neither party addresses it, one could argue that an ineffective assistance of appellate counsel claim is *sui generis* for purposes of the statute of limitations. This is because all other types of claims revolve around the time of trial. In contrast, an appellate counselor's failure does not occur or become evident until long after the trial. In the context of Petitioner's case, one might argue that Petitioner could not have known whether his appellate attorney had injured his appeal until December 12, 2001. That is

because up until 2001, his appeal might have been reinstated by the various corrective motions actually brought. When it was filed in September 1999, the motion to set aside the dismissal *might* have been successful. Likewise, when the second motion to vacate the dismissal was filed in August 2001, the court of appeal *might* have granted relief. Finally, when the unsuccessful motion to reinstate the appeal was itself appealed to the California Supreme Court, the Supreme Court *might* have granted relief and reinstated Petitioner's appeal. That, outcome *would* have eviscerated the foundation of his ineffective assistance claim. He would have finally been able to present his meritorious arguments on appeal. Consequently, one might argue, it was not until December 12, 2001, when the California Supreme Court denied the appeal of the appeals court decision to refuse to reinstate the appeal, that the federal claim of ineffective assistance of appellate counsel became ripe.

The problem with this theory is that it lacks finality and encourages repetitive frivolous motion practice as a means for extending the running of the statute of limitations. Under this theory, one could wait years before filing a motion to reinstate an appeal, or file successive motions in the vain hope that one sympathetic ear would reinstate the previously lost appeal rights. Under this theory, a federal habeas petition claiming ineffective appellate assistance could always be made timely and the statute of limitations would be reduced to a curiosity.

Two other courts have rejected similar arguments. In those cases, petitioners had failed to take direct appeals from their convictions. While they did not argue ineffective assistance of appellate counsel, they did eventually file motions seeking permission for a late or delayed appeal. Once in federal court, the petitioners argued that the habeas statute of limitations should not run until after their motions to pursue late appeals were denied. The courts decided that AEDPA's one-year limitations clock could not be "retriggered" in this fashion and that to allow a retriggering by this route would emasculate the statute. *Searcy v. Carter*, 246 F.3d 515 (6th Cir. 2001); *Raynor v. Dufrain*, 28 F.Supp. 2d 896 (S.D. N.Y. 1998). The reasoning of the *Raynor* decision is compelling:

> This is a position that we cannot endorse, because it would effectively eviscerate the AEDPA's statute of limitations. Leave to file a late notice of

> appeal can be sought at any time, even many years after conviction. If the one-year period of limitations did not begin to run until such an application for leave to appeal was denied, the one-year statute of limitations would be meaningless; merely by delaying his application for leave to file a late notice of appeal, a petitioner could indefinitely extend the time for seeking habeas relief. The statute of limitations provision of the AEDPA would thus be effectively eliminated, a clearly unacceptable result.

28 F.Supp.2d at 898 (*quoted in Searcy*, 246 F.3d at 519). For similar reasons, this Court finds that once an order dismissing an appeal becomes "final," AEDPA's statute of limitations clock is triggered. The clock cannot be "retriggered" by thereafter filing a later motion to vacate the dismissal or reinstate the appeal.

In the case at bar, the order dismissing Tatarinov's appeal became final under California law in 1997. The clock was not retriggered by the motions to reinstate his appeal filed later in 1999 and 2001. The statute of limitations ran out at the latest in 1999 under any viable theory, and the instant Petition is too late – unless Petitioner is entitled to the benefit of tolling.

B. AEDPA's STATUTORY TOLLING PROVISION

In order for AEDPA's statutory tolling provision to apply there must be a "properly filed application for post-conviction or other collateral review...pending" in state court. 28 U.S.C.A. § 2244(d) (2). Petitioner did not have any collateral review "pending" until he filed his state petition for habeas relief in February 2002. By that time the statute of limitations clock had run down.

Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000), held that the AEDPA statute of limitations is tolled for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." This holding contemplates that the state inmate first files a petition in the state's superior court, then proceeds to the California Court of Appeal, and concludes state review in the California Supreme Court. *Lewis v. Mitchell*, 173 F. Supp.2d 1057 (C.D. Cal. 2001) (*citing Nino* at

1006 n.2 & n.3).[3] Applying *Nino* to Petitioner's case, the tolling provisions of the AEDPA do not save his Petition from being dismissed.

Here, Petitioner had no state habeas petition "pending" within the statutory period. *Nino*, 183 F.3d at 1005 (statutory tolling is available for periods when the petitions comprise "one complete round of the State's established appellate review process."). Statutory tolling does not apply to periods between petitions that do not form part of a progressive series from the superior court, to the court of appeal, to the California Supreme Court. *Id.* Thus, the statute of limitations ran long before 2002 when Petitioner filed his first petition for habeas relief in the California Court of Appeal. Because there was no state habeas petition "pending" within the statutory period of 28 U.S.C. §2244(d)(2), the AEDPA's statutory tolling provisions do not apply and the Petition remains untimely.

C. AEDPA's EQUITABLE TOLLING PROVISION

Having determined that statutory tolling does not apply, this Court must next determine whether equitable tolling will excuse the delay.

1. Applicable Law

AEDPA's one-year statute of limitations is subject to equitable tolling. *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on other grounds by Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1997) (en banc), *cert. denied*, 526 U.S. 1060 (1999). *Beeler* held that the time bar of 28 U.S.C. § 2244 (d)(1) can be tolled if "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." 128 F.3d at 1288-89 (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir. 1997)). However, *Beeler* admonishes judges to "take seriously Congress' desire to accelerate the federal habeas process" and "only authorize extensions when the high hurdle is surmounted." *Id.* at 1289.

In *Allen v. Lewis*, 255 F.3d 798, 799 (9th Cir. 2001), the Ninth Circuit established the

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[3] In California, the supreme court, intermediate courts of appeal, and superior courts all have original habeas corpus jurisdiction. *See* Cal. Const. art. VI, §10. The state prisoner may first present his habeas petition to the superior court. *See* Cal. R. Ct. 260. Although a superior court order denying habeas corpus relief is non-appealable, *see People v. Griggs*, 67 Cal. 2d 314 (1967), a state prisoner may file a new habeas corpus petition in the court of appeals, *see In re Reed*, 33 Cal. 3d 914 (1983).

showing a prisoner must make in order to demonstrate that "extraordinary circumstances" made it "impossible to file a petition on time." *Allen* held that the prisoner, at the very least, must show that the "extraordinary circumstances" were the proximate cause of his untimeliness. *Id.*

a. Petitioner's Argument

Petitioner argues the statute of limitations should be equitably tolled because of Verhovsky's misrepresentations and that because of Verhovsky's ability to communicate to Petitioner in Petitioner's native Russian language, Petitioner trusted and believed his attorney was effectively representing him. This unique attorney-client relationship coupled with the attorney's prevarications presents the rare case for equitable tolling, according to Petitioner. Specifically, he asserts,

> After petitioner learned that the appeal had been dismissed, Verhovsky continued to practice deception by misleading petitioner concerning procedures available to reinstate the appeal. Verhovskoy engaged in this ongoing pattern of lies, deception and misinformation to hide from petitioner the fact that Verhovsky had acted incompetently, first by causing the direct appeal to be dismissed, and then by failing to get it reinstated.

Opposition to Motion to Dismiss, at 3. Continuing on, petitioner contends,

> ...petitioner placed more than the usual amount of reliance on Verhovskoy as his attorney, and Verhovskoy repeatedly violated that trust by practicing deception to hide his own incompetence. This case presents the type of "rare and exceptional circumstances" that justify the use of equitable tolling.

Id. (citations omitted). Petitioner explains that even after he learned from his attorney that the appeal had been dismissed, Verhovsky told him that he was working on a solution, but "that it takes time to reinstate the appeal." *Id.* at 5. Petitioner explains, "[e]ventually Verhovsky filed a motion to reinstate the appeal, which the court eventually denied. Thereafter, Attorney Verhovsky continued to lie, telling petitioner and his wife that nothing further could be done to revive the appeal." *Id.* "Eventually," writes petitioner, he "became hopelessly lost in the web of deceit that his lawyer spun." *Id.* at 6.

b. Respondent's Argument

Respondent argues that a petitioner must establish that the extraordinary circumstances actually caused the delay and that "even giving Petitioner's Russian

background and English language skills appropriate consideration, his inability to file a timely petition must be attributable to his personal failure to exercise due diligence, not some external force." Memorandum of Points and Authorities at 11. Respondent continues his argument pointing to Petitioner's awareness by the fall of 1998 that Verhovsky had let the appeal flounder and that he had been lying about its progress. *Id.* at 12. Respondent also points out that: (1) Verhovsky made no representations or misrepresentations regarding the filing of a federal habeas petition; (2) Petitioner was not confined to prison and could have retained other counsel; and (3) Petitioner could have learned about and filed a federal habeas petition on his own. *Id.* at 12-13.

2. Extraordinary Circumstances Were Not the Cause of Petitioner's Untimeliness

As explained above, Petitioner had one year from either May 28, 1997 (under § 2244(d)(1)(A)), or summer 1998 (under § 2244(D)(1)(D)) to file his federal habeas petition. He missed both deadlines. He suggests that the continuing lies and deceit of Verhovsky together with the unique Russian connection comprise the "rare and exceptional circumstances" entitling him to equitable tolling. However, the Ninth Circuit has explained, "[i]f the person seeking equitable tolling has not exercised reasonable diligence in attempting to file, after the extraordinary circumstances began, the link of causation between the extraordinary circumstances and the failure to file is broken." *Allen*, 255 F.3d at 800-01.

a. The 1st Wake-up Call

In this case, despite the "web of deceit his lawyer had spun," Petitioner did finally discover that Verhovsky had been lying to him and that the direct appeal had been dismissed. This was sometime in the fall of 1998. It was at this time that Petitioner should have done something to prepare to seek collateral relief. If Petitioner had (as he asserts) become "hopelessly lost in the web of deceit" spun by his lawyer, the fall of 1998 should have been a wake-up call. He should have taken steps to protect his habeas rights on his own. He did not. Instead, he decided that he would proceed with Verhovsky's plan to file a motion to reinstate the appeal. Meanwhile, time passed.

b. The 2nd Wake-up Call

Approximately one year passed before Verhovsky filed the discussed motion to reinstate the appeal on September 10, 1999. The California Court of Appeal rejected the request two weeks later on September 24, 1999. This was another wake-up call. Again, Petitioner should have taken steps to protect his habeas rights. The appeal was over. He understood this much. In his declaration he states, "[f]inally in September 1999 Mr. Verhovsky filed a motion to reinstate the appeal....Later he told me the motion was denied....I believed the appeal was over and nothing more could be done about it." Petition, Exhibit "B," at 2.

c. The 3rd Wake-up Call

Another 15 months passed before Petitioner received his third wake-up call, *i.e.*, the letter from Verhovsky terminating his representation in all matters and the letter from the State Bar advising that Verhovsky had been suspended from practice. Even then, petitioner waited another six months before he hired new counsel in the summer of 2001. His new counsel has diligently pursued collateral relief and federal habeas relief, but the effort comes too late.

d. Petitioner's Own Obligation to Exercise Reasonable Diligence

The Supreme Court has emphasized that "the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation" because "the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation." *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991), *r'hng denied*, 501 U.S. 1277 (1991). In order to minimize that risk, habeas petitioners must exercise reasonable diligence in overseeing the actions of their attorneys. *See Johnson v. McCaughtry*, 265 F.3d 559, 566 (7th Cir. 2001), *cert. denied*, 535 U.S. 937 (2001) ("clients, whether in prison or not, must vigilantly oversee the actions of their attorneys and, if necessary, take matters into their own hands"); *see also Harris v. Hutchinson*, 209 F.3d 325, 330-31 (4th Cir. 2000) (AEDPA statute of limitations not equitably tolled by lawyer's mistake resulting in missed deadline, because such mistake is not an extraordinary circumstance); *Taliani v. Chrans*,

189 F.3d 597, 598 (7th Cir. 1999) (concluding that, to the extent equitable tolling is available for AEDPA, no tolling occurred because of a lawyer's mistake resulting in a missed deadline).

Petitioner has not identified any circumstances beyond his control that made it impossible for him to file a timely federal habeas petition. His decision to wait 12 months and follow Verhovsky's suggestion and pursue reinstating his direct appeal before filing a federal habeas petition within AEDPA's one-year window was not a circumstance beyond his control. Likewise, his decision to do nothing for another 15 months after the motion to reinstate the appeal failed was not a circumstance beyond his control. Moreover, his decision to delay another six months after learning that Verhovsky would no longer be representing him was another circumstance not beyond his control. These decisions were entirely Petitioner's. With 20/20 hindsight, Petitioner may have exercised poor judgment, but the repeated making of unwise choices does not rise to the level of "extraordinary circumstances" such that AEDPA's statute of limitations should be tolled. *Cf. Frye v. Hickman*, 273 F.3d 1144 (9th Cir. 2001), *cert. denied*, 535 U.S. 1055 (2002) (holding that the miscalculation of the AEDPA limitations period by counsel and counsel's negligence in general *did not* constitute extraordinary circumstances sufficient to warrant equitable tolling); *accord Smaldone v. Senkowski*, No. 00-2519, 2001 WL 1453925, at 4 (2nd Cir. Nov. 16, 2001); *Fahy v. Horn*, 240 F.3d 239, 244 (3rd Cir. 2001), *cert. denied*, 534 U.S. 944 (2001); *Harris v. Hutchinson*, 209 F.3d 325, 330-31 (4th Cir. 2000); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000), *cert. denied*, 534 U.S. 863 (2001); *Ellis v. Martin*, No. 98-6450, 1999 WL 1101241, at 2 (10th Cir. Dec. 6, 1999) (unpublished opinion); *Sandvik v. United States*, 177 F.3d 1269, 1272 (11th Cir. 1999), *r'hng denied*, 207 F.3d 666 (11th Cir. 2001).

Further, although Petitioner does not allege it, even if Petitioner had difficulty in understanding the procedures for filing his petitions for collateral relief or understanding his rights because he is not a lawyer and the legal issues are complex, the circumstances would not compel equitable tolling. *See Hebner v. MaGrath*, 2001 WL 764474 (N.D. Cal 2001) (holding that being a layman in the law and that the issues are complex are not

sufficient basis for equitable tolling); *Ross v. R. Q. Hickman*, 2001 WL 940911 (N.D. Cal. 2001) (same). Certainly, Petitioner's difficulty with English does not warrant equitable tolling. *Nguyen v. Mervau*, 1998 U.S. Dist. LEXIS 13547 (N.D. Cal. 1998) (lack of fluency in English is not an extraordinary circumstance); *Cf. Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy of pro se petitioner not sufficient cause to avoid procedural bar).

e. Policy Considerations

Finally, the instant case raises policy considerations, which counsel against a finding of equitable tolling. Petitioner's claim under §2254 is subject to a congressionally imposed limitations period as prescribed by the AEDPA. As the United States Supreme Court stated in *Mohasco Corp v. Silver*, 447 U.S. 807, 826 (1980), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." To allow Petitioner's reliance on an attorney who had dropped his appeal and lied to cover it and Petitioner's own inaction for another two and one-half years after discovering his attorney's duplicity to constitute grounds for equitable tolling, would essentially allow Plaintiff more than thrice the amount of time specified by Congress for the filing of a writ of habeas corpus under the AEDPA. Given the strict procedural requirement imposed by the legislature and the general deference of the Supreme Court, this Court declines to recommend a result that would distort the limitations period. *See e.g. Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984), *r'hng denied*, 437 U.S. 1261 (1984) ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants.").

III. CONCLUSION

This Court finds that exceptional circumstances did not exist to warrant the equitable tolling of the AEDPA one-year statute of limitations. The Petition for Writ of Habeas Corpus filed on October 11, 2002 is time barred.

For the reasons set forth above, this Court recommends that Respondent's Motion

to Dismiss the Petition for Writ of Habeas Corpus be **GRANTED**. This Report and Recommendation is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1).

IT IS ORDERED that no later than **April 30, 2003**, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections should be filed with the Court and served on all parties no later than **May 14, 2003.** The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: 4/1/03

ROGER T. BENITEZ
United States Magistrate Judge

cc: U.S. District Judge Thomas J. Whelan

APPENDIX

Pet'r's Jury Trial August 1996	Appeal Dismissed For Failure to File Brief 4/28/97	Pet'r's Wife Discovers Appeal is Dismissed Summer 1998	Pet'r Discovers Appeal is Dismissed Fall 1998	Motion to Reinstate Appeal 9/10/99	Motion is Denied 9/24/99	Letter from Attorney Withdraw'g From Pet'r Cases 12/24/00	Letter from State Bar Re: Suspension of Atty 1/19/01	New Atty Files Second Motion to Reinstate Appeal 8/30/01	Motion is Denied; Appeal to Cal. Sup.Ct. Denied Fall 2001	Pet'r Exhausts State Remedies With State Habeas Petition Spring &/Summer 2002	Federal Petition for Writ of Habeas Corpus Filed 10/11/02

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DIMITRI TATARINOV VALEREVEICH,

Petitioner,

v.

JOHN ASHCROFT, Attorney General,

Respondent.

CASE NO: 04-CV-2595 W (BLM)

ORDER DENYING WRIT OF HABEAS CORPUS

28 U.S.C. § 2241

On December 30, 2004 the Court received this 28 U.S.C. § 2241 habeas petition from the Ninth Circuit after that court concluded that it did not have jurisdiction to hear Petitioner Dimitri Tatarinov Valereveich's ("Petitioner") appeal from the Board of Immigration Appeals' January 14, 2003 final removal order. Instead, the Ninth Circuit treated Petitioner's appeal as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and transferred the case to the Southern District of California.

After reviewing the parties' appellate briefs, this Court ordered the parties to submit additional briefs specifically discussing the merits of Petitioner's claims. Both Petitioner and Respondent have submitted their additional briefs. Petitioner claims he is entitled to habeas relief because the Immigration Judge ("IJ") erred in denying (1) his application for asylum and (2) his request for an adjustment of status and waiver pursuant to section 212(h) of the Immigration and Nationality Act ("INA"). Respondent opposes. The Court decides the matter on the papers submitted and without oral argument. See Civil Local Rule 7.1(d)(1). For the following reasons, the Court **DENIES** Petitioner's habeas petition.

I. BACKGROUND[1]

Petitioner is a native and citizen of Russia. He came to the United States as a visitor in May of 1992. In 1993 he met his wife, a U.S. citizen by birth and they were married in 1994.

On January 6, 1995 Petitioner was granted Conditional Permanent Resident Status based on his marriage to a United States citizen. Approximately two years later, he filed an application to remove the conditional status. On June 9, 2000 the Immigration and Naturalization Service ("INS") granted Petitioner's request and removed the condition from his status.

In 1995 Petitioner was convicted of misdemeanor petty theft for shoplifting. In 1996 Petitioner was again caught shoplifting but this time he was convicted of robbery because he became engaged in an altercation with a store security guard. Petitioner was caught shoplifting for the third time in 1998 and he was convicted of felony theft due to his prior convictions.

In June of 1998 the INS placed Petitioner in removal proceedings based on these convictions. The IJ concluded that Petitioner was a removable alien convicted of a crime involving moral turpitude within five years of his admission as well as an alien convicted of two or more crimes involving moral turpitude. The IJ denied Petitioner's

[1]The facts in this case are not in dispute. See (*Respondent's Return* at 2).

request for asylum, found that he was statutorily ineligible for adjustment of status with a section 212(h) waiver and ordered him removed.

II. LEGAL STANDARD

Federal law vests district courts with jurisdiction to hear habeas corpus petitions. See 28 U.S.C. § 2241. Thus, jurisdiction extends to "prisoner[s] ... in custody in violation of the Constitution or laws or treaties of the United States ... " 28 U.S.C. § 2241(c)(3). While district courts will not exercise habeas jurisdiction to review INS discretionary decisions, habeas review is available for petitions that allege constitutional or statutory error in the removal process. Gutierrez-Chavez v. INS, 298 F.3d 824, 830 (9th Cir. 2002). Habeas jurisdiction also extends to claims regarding the application of legal principles to undisputed facts. Singh v. Ashcroft, 351 F.3d 435, 441-41 (9th Cir. 2003) (habeas review "extend[s] to claims of erroneous *application* or interpretation of statutes") (emphasis in original).

III. DISCUSSION

A. PETITIONER FAILED TO DEMONSTRATE ELIGIBILITY FOR ASYLUM

Petitioner contends that the IJ erred in denying his asylum application. Petitioner does not contest the IJ's factual conclusions. Instead, Petitioner argues that the IJ erred when applying the relevant legal principles to the facts of his case. In essence, Petitioner claims that based on the facts he presented he was entitled to asylum. The Court respectfully disagrees.[2]

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[2]Respondent's opposition to this section of the Petition focused solely on the standard of review applicable to IJ and Board of Immigration Appeals factual determinations. However, the facts of this case are not in dispute. Petitioner's claim is simply that the IJ erred in applying the statutory legal principles governing asylum claims to the facts of his case. At best, this is a mixed question of law and fact, although such claims begin to look more like purely legal questions when facts are not in dispute. See e.g. Lazo-Majano v. I.N.S., 813 F.2d 1432, 1434 (9th Cir.1987), overruled on other grounds 79 F.3d 955 (holding that where facts are undisputed and the only issue is proper application of the law to the facts legal questions are presented). Either way, this Court's review is *de novo*. Barapind v. Enomoto, 400 F.3d 744, 748 (9th Cir. 2005) (en banc) (habeas review of mixed questions of law and fact is conducted *de novo*).

As succinctly stated by the Ninth Circuit:

> Section 208(a) of the Immigration and Nationality Act ("INA") gives the Attorney General discretion[3] to grant political asylum to any alien deemed to be a "refugee" within the meaning of § 101(a)(42)(A) of the INA, 8 U.S.C. § 1101(a)(42)(A). 8 U.S.C. § 1158(b)(1). "A refugee is defined as an alien unwilling to return to his or her country of origin 'because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'" Fisher v. INS, 79 F.3d 955, 960 (9th Cir. 1996) (en banc) (quoting 8 U.S.C. § 1101(a)(42)(A)). Thus, to be eligible for asylum, an applicant must establish "either past persecution or a well-founded fear of present persecution on account of [a protected ground]." Mejia-Paiz v. INS, 111 F.3d 720, 723 (9th Cir. 1997) (internal quotation marks omitted).

Singh v. Ashcroft, 362 F.3d 1164, 1170 (9th Cir. 2004).

Here, the IJ concluded that Petitioner did not meet the statutory requirements for asylum because he failed to demonstrate that he had been persecuted or that he was a member of any particular social group. (*Respondent's Return*, Ex. at 12-14). The IJ also concluded that Petitioner had not established any threat of future persecution. Having reviewed the undisputed facts and the applicable law, the Court concludes that the IJ did not err in denying Petitioner asylum as a matter of law.

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[3]Although the statute provides the Attorney General with discretion to grant asylum, the IJ in this case explicitly noted that he was not denying asylum on a discretionary basis. Rather, the IJ made clear that he was denying Petitioner's asylum application because he failed to meet the legal requirements as a matter of law. (*Respondent's Return*, Ex. at 16). The normal deference given to the Attorney General's discretionary decisions is therefore inapplicable in this case.

As the IJ correctly concluded, Petitioner provided no evidence of past persecution as that term is understood in this Circuit.[4] Petitioner identified only one incident where he was personally threatened and extorted by what he believed were members of a criminal organization. While working as a supervisor in a body shop, several men that Petitioner believed were organized crime members approached Petitioner and asked him to begin paying protection money. They told Petitioner that when they returned he should have a package for them and that he was "play[ing] with fire." (*Petition* at 7-8). These men also apparently visited Petitioner's family on one occasion and spoke with his brother but Petitioner does not claim that they threatened his brother or any other member of his family. Id. Although this attempted extortion is certainly a criminal incident, it is not one that rises to the level of "persecution." Gormley v. Ashcroft, 364 F.3d 1172, 1176 (9th Cir. 2004) ("persecution is an extreme concept that does not include every sort of treatment that our society regards as offensive"); Prasad v. INS, 47 F.3d 336, 339 (9th Cir.1995) (holding that the petitioner's detention for four to six hours and the accompanying physical abuse he endured was insufficient to compel a finding of past persecution).

Nor has Petitioner demonstrated that this past "persecution" was due to his membership in a particular social group, as that term is understood in immigration law, or that his fear of future persecution is due to such membership. Petitioner has directed

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[4]The Court notes that the Ninth Circuit generally reviews IJ determinations regarding past persecution for substantial evidence, suggesting that such determinations constitute factual findings. See e.g. Prasad v. INS, 47 F.3d 336, 340 (9th Cir.1995) (in denying petition for review, the court held that "Although a reasonable factfinder could have found [the] incident sufficient to establish past persecution, we do not believe that a factfinder would be compelled to do so."). However, where the facts are not in dispute, the Ninth Circuit's review begins to more closely resemble *de novo* review. See Navas v. I.N.S., 217 F.3d 646, 657 (9th Cir. 2000) (holding that where it was undisputed that alien had received death threat, Ninth Circuit precedent "dictated" a conclusion that the alien has established persecution). Regardless, the Court need not resolve the issue since even under the more lenient *de novo* standard, the Court concludes Petitioner has failed to show persecution.

this Court to no authority in this Circuit or elsewhere, and the Court's research has revealed none, holding that membership in the class of "educated, upper-income supervisors of business," which essentially amounts to being middle class, constitutes membership in a particular social group for asylum purposes.[5] Cognizable social groups do "not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance." Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576-77 (9th Cir. 1986). Indeed, "such an all-encompassing grouping as [Petitioner has] identif[ied] simply is not that type of cohesive, homogeneous group to which . . . the term 'particular social group' was intended to apply." Id. at 1577 (holding that membership in the class of young, working class, urban males did not constitute a particu lar social grou p for asylu m pu rposes). The Court therefore concludes that Petitioner's membership in the "class of educated, upper-income supervisors of business" is not a protected social group for purposes of asylum. (*Petition* at 8). Accordingly, asylum is statutorily unavailable to Petitioner on this basis alone.

Petitioner also claims that "he will face persecution at the hands of the Russian government" as a deported criminal. (*Petition* at 8). Petitioner's claim that deported criminals, a group that is obviously far from cohesive or homogenous, constitutes a particular social group protected for purposes of asylum law strains credulity. See Sanchez-Trujillo, 801 F.3d at 1577. Such a holding would allow all criminal aliens in deportation proceedings to claim asylum based on their criminal status - the very reason they are being deported. The IJ also properly denied Petitioner's asylum claim on this ground as well.

Accordingly, Petitioner cannot meet the statutory eligibility requirements for asylum. It follows that he cannot meet the more stringent standards for withholding of removal. Fisher v. I.N.S., 79 F.3d 955, 964 (9th Cir. 1996). Petitioner's first claim

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[5]This is clearly a legal question which this court reviews de novo. Tchoukhrova v. Gonzales, --- F.3d ----, 2005 WL 913449, *5 (9th Cir. 2005) ("Whether a category constitutes a particular social group for the purposes of asylum and withholding of removal is a legal question we review de novo.").

for habeas relief is therefore **DENIED**.

B. THE IJ DID NOT ERR IN DENYING PETITIONER'S REQUEST FOR ADJUSTMENT OF STATUS AND WAIVER UNDER INA SECTION 212(H).

Petitioner next contends that the IJ improperly denied his request for a section 212(h) waiver and adjustment of status. Section 212(h) waivers are available to non-lawful permanent residents ("non-LPR") without restriction but only to lawful permanent residents ("LPR") if they have (1) not been convicted of an aggravated felony and (2) have resided in the United States for at least seven years. 8 U.S.C. § 1182(h). Petitioner argues that this distinction between LPRs and non-LPRs violates his equal protection rights. Alternatively, Petitioner argues that he was not an LPR within the meaning of section 212(h) when the INS commenced deportation proceedings against him. Respondent counters that Petitioner's claim is foreclosed by the Ninth Circuit's decision in Taniguchi v. Shultz,303 F.3d 950 (9th Cir. 2002) in which that court held that there was a rational basis for precluding LPRs convicted of aggravated felonies from seeking 212(h) relief while allowing non-LPRs who had committed similar crimes to qualify.

Petitioner has not committed any crimes that constitute aggravated felonies. Instead, the IJ concluded that Petitioner was ineligible for a section 212(h) waiver because he was an LPR who had not resided in the United States for at least seven years. (*Respondent's Return*, Ex. at 21); 8 U.S.C. § 1182(h). Petitioner contends the Taniguchi decision does not apply to this case because (1) he was deemed ineligible due to his length of residency not an aggravated felony and (2) he was only a "conditional" LPR when the INS initiated removal proceedings. The Court disagrees.

To win his equal protection challenge, Petitioner must show that the challenged classification is "wholly irrational." Sudomir v. McMahon, 767 F.2d 1456, 1464 (9th Cir. 1985). "'Line-drawing' decisions made by Congress or the President in the context of immigration and naturalization must be upheld if they are rationally related to a legitimate government purpose." Ram v. INS, 243 F.3d 510, 517 (9th Cir. 2001). Petitioner has the burden to negate "every conceivable basis which might support [the

challenged classification] ... whether or not the basis has a foundation in the record." Heller v. Doe, 509 U.S. 312, 320-21 (1993) (internal citation omitted).

Here, Petitioner has argued only that section 212(h)'s distinction between LPRs and non-LPRs is irrational because Congress created a distinction that treats LPRs worse than undocumented immigrants. However, simply disadvantaging legal aliens in favor of undocumented aliens does not mean that the legal alien's equal protection rights have been violated. Taniguchi, 303 F.3d at 958 (holding that there is a rational basis for treating LPR aggravated felons more harshly than non-LPR aggravated felons). Although the Taniguchi court's rational basis analysis focused on the permissibility of treating LPRs who had committed aggravated felonies differently than non-LPRs who had committed similar crimes, some of the Court's reasoning applies with equal force to LPR's denied section 212(h) waivers based on the length of time they have resided in the United States.

As noted in Taniguchi, one of Congress's goals in limiting section 212(h) waivers was to expedite the removal of criminal aliens. Taniguchi, 303 F.3d at 958. However, Congress' overarching goal was to expedite the removal of *all* "excludable and deportable aliens" with a special emphasis on criminal aliens. See S. REP. NO. 104-249, at 2. Restricting section 212(h) waivers to LPRs who have continuously resided in the United States for at least seven years furthers this goal by limiting the number of deportable or excludable aliens eligible for the waiver. The fact that Congress has not placed similar conditions on non-LPR's eligibility for section 212(h) waivers is not fatal to the statute despite the fact that "it might have been wiser, fairer, and more efficacious" to bar section 212(h) relief to all aliens residing in the United States for less than seven years. Taniguchi, 303 F.3d at 958; see also Butler v. Apfel, 144 F.3d 622, 625 (9th Cir. 1998) ("Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). Petitioner's equal protection challenged is therefore without merit and his habeas claim on that ground is **DENIED.**

Petitioner's claim that he was not a lawful permanent resident within section 212(h)'s meaning because his status was "conditional" is also without merit. This argument is foreclosed by Petitioner's failure to raise it before the IJ and his admission in that proceeding that he was an LPR. (*Respondent's Return*, Ex. at 2). Even if Petitioner could raise this argument, it is unavailing because his legal status as an LPR was not diminished by its conditional nature. See Kalal v. Gonzales, -- F.3d --, 2005 WL 712481 (9th Cir. 2005) ("the alien shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis"); 8 C.F.R. § 216.1 ("A conditional permanent resident is an alien who has been lawfully admitted to permanent residence within the meaning of section 101(a)(20) of the Act . . . [and] [u]nless otherwise specified, the rights, privileges, responsibilities and duties which apply to all other lawful permanent residents apply equally to conditional permanent residents[.]"). Moreover, by operation of law Petitioner's conditional status was removed as of January 6, 1997, well before removal proceedings commenced, even though the IRS did not decide his petition for removal of the condition until 2000. See 8 U.S.C. § 1186a(a)(3)(B) (if the Attorney General grants the petition, the Attorney General "shall remove the conditional basis of the parties effective as of the second anniversary of the alien's obtaining the status of lawful admission for permanent residence.").[6] Petitioner's claim for habeas relief on this ground must therefore be **DENIED**.

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[6]Petitioner obtained lawful permanent resident status on a conditional basis on January 6, 1995 and the INS commenced removal proceedings against him on June 24, 1998. (Petition at 5-6).

IV. CONCLUSION AND ORDER

In light of the foregoing, the Court **DENIES** Petitioner's § 2241writ of habeas corpus. (*Doc. No.* 1). The clerk of the court shall close the district court case file.

IT IS SO ORDERED.

DATE: April 29, 2005

HON. THOMAS J. WHELAN
United States District Court
Southern District of California

CC: ALL PARTIES AND COUNSEL OF RECORD